

MEMORANDUM OPINION

December 7, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:	:	
	:	
RANDALL JOSEPH CURINGTON	:	Case No. 05-38188
MELISSA JANE CURINGTON	:	Chapter 13
	:	
Debtors	:	

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTORS:

RICHARD M. MAYER, ESQ.
1111 Northshore Drive, Suite S-570
Knoxville, Tennessee 37919

CHAPTER 13 TRUSTEE:

GWENDOLYN M. KERNEY, ESQ.
Post Office Box 228
Knoxville, Tennessee 37901

1 THE COURT: This contested matter is before me on the Trustee's Motion
2 to Dismiss filed by the Chapter 13 Trustee on December 2, 2005. The Motion is
3 grounded upon the Debtors' failure to obtain the credit counseling briefing required by
4 § 109(h) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

5 This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (O).

6 The relevant facts, all of which are undisputed and ascertainable from the
7 record in the Debtors' case file, are as follows. The Debtors filed their joint bankruptcy
8 case under Chapter 13 on October 20, 2005, at which time they also filed a Motion on
9 Exigent Circumstances requesting a waiver of the budget and credit counseling briefing
10 requirement of 11 U.S.C. § 109(h)(1) (2005), which I summarily denied by an order
11 entered on October 27, 2005. Contemporaneously with the filing of their petition, the
12 Debtors also filed a "Certificate of Exigent Circumstances" certifying the following:

- 13 1. The Debtors have been contacted by Vanderbilt
14 Mortgage, and threatened with replevin of their home.
- 15 2. The Debtors do not believe that they can come up with
16 the \$50.00 required by Consumer Credit Counseling until Friday,
17 October 21, 2005, and need to file their Chapter 13 case
18 immediately.

19 On December 5, 2005, the Debtors filed their Certificate from Consumer Credit
20 Counseling Service evidencing that they obtained counseling on December 3, 2005.

21 11 U.S.C. § 109 addresses "Who may be a debtor," and provides, in material
22 part, in subsection (h):

23 (h)(1) Subject to paragraphs (2) and (3), and notwithstanding any
24 other provision of this section, an individual may not be a debtor
25 under this title unless such individual has, during the 180-day

1 period preceding the date of filing of the petition by such
2 individual, received from an approved nonprofit budget and
3 credit counseling agency described in section 111(a) an
4 individual or group briefing (including a briefing conducted by
5 telephone or on the Internet) that outlined the opportunities for
6 available credit counseling and assisted such individual in
7 performing a related budget analysis.

8

9 (3)(A) Subject to paragraph (B), the requirements of paragraph
10 (1) shall not apply with respect to a debtor who submits to the
11 court a certification that –

12 (i) describes exigent circumstances that merit a waiver of
13 the requirements of paragraph (1);

14 (ii) states that the debtor requested credit counseling services
15 from an approved nonprofit budget and credit counseling
16 agency, but was unable to obtain the services referred to in
17 paragraph (1) during the 5-day period beginning on the date
18 on which the debtor made that request; and

19 (iii) is satisfactory to the court.

20 (B) With respect to a debtor, an exemption under
21 subparagraph (A) shall cease to apply to that debtor on the date
22 on which the debtor meets the requirements of paragraph (1), but
23 in no case may the exemption apply to that debtor after the date
24 that is 30 days after the debtor files a petition, except that the
25 court, for cause, may order an additional 15 days.

1 (4) The requirements of paragraph (1) shall not apply with
2 respect to a debtor whom the court determines, after notice and
3 hearing, is unable to complete those requirements because of
4 incapacity, disability, or active military duty in a military combat
5 zone. For the purposes of this paragraph, incapacity means that
6 the debtor is impaired by reason of mental illness or mental
7 deficiency so that he is incapable of realizing and making rational
8 decisions with respect to his financial responsibilities; and
9 'disability' means that the debtor is so physically impaired as to
10 be unable, after reasonable effort, to participate in an in person,
11 telephone, or Internet briefing requirement under paragraph (1).

12 Proof that a debtor has received consumer credit counseling must be filed
13 with the court at the commencement of an individual's case filed on and after
14 October 17, 2005. Pursuant to 11 U.S.C. § 521(a), all individual debtors must file a list
15 of creditors, a schedule of assets and liabilities, a schedule of current income and
16 expenses, a statement of financial affairs, copies of payment advices or other evidence
17 of payment received within 60 days before the petition was filed, and other specified
18 documentation. Pursuant to 11 U.S.C. § 521(b), all individual debtors must also file the
19 following:

20 (1) a certificate from the approved nonprofit budget and credit
21 counseling agency that provided the debtor services under section
22 109(h) describing the services provided to the debtor; and
23 (2) a copy of the debt repayment plan, if any, developed under
24 section 109(h) through the approved nonprofit budget and credit
25 counseling agency referred to in paragraph (1).

1 “[A]s long as the statutory scheme is coherent and consistent, there generally
2 is no need for a court to inquire beyond the plain language of the statute.” *United States*
3 *v. Ron Pair Enters., Inc.*, 109 S. Ct. 1026, 1030 (1989). The Supreme Court “ha[s]
4 stated time and time again that courts must presume that a legislature says in a statute
5 what it means and means in a statute what it says there. When the words of a statute are
6 unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”
7 *Conn. Nat’l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (quoting *Rubin v. United*
8 *States*, 101 S. Ct. 698, 701 (1981)).

9 “The starting point in any case involving the meaning of a statute
10 [] is the language of the statute itself.” *Group Life & Health Ins.*
11 *Co. v. Royal Drug Co.*, 440 U.S. 205, 210, 99 S. Ct. 1067, 1073,
12 59 L. Ed. 2d 261 (1979); *Vergos v. Gregg’s Enterprises, Inc.*, 159
13 F.3d 989, 990 (6th Cir. 1998). A fundamental canon of statutory
14 construction is that, unless otherwise defined, words will be
15 interpreted as taking their ordinary, contemporary, common
16 meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct.
17 311, 314, 62 L. Ed. 2d 199 (1979). “In construing a federal
18 statute, it is appropriate to assume that the ordinary meaning of
19 the language that Congress employed ‘accurately expresses its
20 legislative purpose.’” *Mills Music, Inc. v. Snyder*, 469 U.S. 153,
21 164, 105 S. Ct. 638, 645, 83 L. Ed. 2d 556 (1985), quoting *Park*
22 *‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 195, 105
23 S. Ct. 658, 83 L. Ed. 2d 582 (1985). “If the words of the statute
24 are unambiguous, the judicial inquiry is at an end, and the plain
25 meaning of the text must be enforced.” *Hudson v. Reno*, 130

1 F.3d 1193, 1199 (6th Cir. 1997), *cert. denied*, 525 U.S. 822
2 (1998), quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S.
3 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989).
4 *United States v. Plavcak*, 411 F.3d 655, 660-61 (6th Cir. 2005); *accord Dorris v.*
5 *Absher*, 179 F.3d 420, 429 (6th Cir. 1999) (“A court should look beyond the language
6 of the statute only when the text is ambiguous or when, although the statute is facially
7 clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or
8 an interpretation inconsistent with the intent of Congress.”).

9 The language of 11 U.S.C. § 109(h)(1) governing bankruptcy cases filed by
10 individual debtors on and after October 17, 2005, is plain and unambiguous: “an
11 individual *may not* be a debtor under [title 11] unless [he or she] has, [within 180 days
12 preceding the filing date],” received consumer credit counseling from an approved
13 agency. There is no mistaking the ordinary, plain meaning that any individual debtor
14 filing a petition under any chapter of the Bankruptcy Code must either (1) participate in
15 consumer credit counseling prior to filing, or (2) certify to the court that they were
16 unable to meet this requirement prior to filing due to exigent circumstances, which then
17 warrants a thirty-day grace period. Upon court approval, a debtor may receive an
18 additional fifteen-day extension; nevertheless, in any event, § 109(h) unequivocally
19 requires debtors to undergo this counseling no later than forty-five days after filing their
20 petitions.

21 Any individual debtor that has not met this requirement may not be a debtor
22 under any chapter of the Bankruptcy Code on and after October 17, 2005.

23 It is of paramount significance that Congress placed these
24 requirements in 11 U.S.C. § 109, the Code’s provision that
25 governs the fundamental eligibility to “be a debtor.” This statute

1 is a necessary threshold to pursuing bankruptcy relief; it
2 identifies who may file a petition for bankruptcy relief in the first
3 place and--by exclusion--who may not do so.
4 That placement alone would be enough to elevate the
5 requirement of credit counseling to signal importance. However
6 Congress also made its intent crystal-clear via an express
7 prohibition: an individual who does not satisfy these
8 prescriptions “may not be a debtor.” When a debtor’s petition is
9 not accompanied by proof that the debtor has gone through credit
10 counseling pre-petition or proof of a specified excuse for not
11 doing so, that person simply cannot proceed to receive the
12 complex of relief available under any chapter of the Bankruptcy
13 Code.

14 *In re LaPorta*, 2005 WL 3078507, at *4 (Bankr. D. Minn. Oct. 27, 2005); *see also In re*
15 *Sukmunga*, 2005 WL 3160607, at *1 (Bankr. D. Utah Nov. 23, 2005) (“[C]ompliance
16 with § 109(h) is an eligibility bar that must be hurdled before an individual may obtain
17 title 11 relief.”).

18 Likewise, the method for obtaining a waiver of the pre-petition consumer
19 credit counseling requirement is expressly and specifically set forth by the statute.
20 Section 109(h)(3) clearly states that any debtor requesting a waiver must file a
21 “certification” with the court.

22 The term “certification” is not defined in the Bankruptcy Code.
23 According to the relevant definition in Black’s Law Dictionary, a
24 certification is “1. The act of attesting. 2. The state of having
25 been attested. 3. An attested statement.” BLACK’S LAW

1 DICTIONARY 220 (7th ed. 1999). The same source defines
2 “attest” as “1. To bear witness; testify <attest to the defendant's
3 innocence>. 2. To affirm to be true or genuine; to authenticate
4 by signing as a witness <attest the will>.” *Id.* at 124. Similarly,
5 Webster’s Third New International Dictionary defines “certify”
6 as “to attest esp. authoritatively or formally.” WEBSTER’S THIRD
7 NEW INTERNATIONAL DICTIONARY 362 (2002). Based on these
8 definitions, a certification is, at a minimum, a written statement
9 that the signer affirms or attests to be true.

10 *In re Cleaver*, 2005 WL 3099686, at *3 (Bankr. S.D. Ohio Nov. 17, 2005) (footnote
11 omitted). Accordingly, a motion of exigent circumstances is not necessary and does not
12 comply with the statute.

13 The certification required by § 109(h)(3) must contain the following
14 necessary elements, which must be satisfactory to the court: (1) a description of the
15 exigent circumstances meriting the waiver; and (2) a statement that the debtor actually
16 requested consumer credit counseling with an approved agency, but he or she was
17 unable to obtain the counseling because the agency was unable to provide the debtor
18 with counseling within five days of the debtor’s request. As with the term
19 “certification,” the Bankruptcy Code does not define “exigent circumstances,” but
20 Black’s Law Dictionary defines the phrase as “[a] situation that demands unusual or
21 immediate action and that may allow people to circumvent usual procedures[.]”
22 BLACK’S LAW DICTIONARY 236 (7th ed. 1999); *see also Cleaver*, 2005 WL 3099686, at
23 *4. It follows that exigent circumstances must be determined on a case by case basis
24 and cannot be uniformly defined. Nevertheless, even if the court does find that exigent
25 circumstances prevented the debtor’s pre-petition consumer credit counseling, and a

1 waiver is granted, the debtor must still complete consumer credit counseling post-
2 petition and file certification thereof within thirty days of the date upon which the
3 bankruptcy case was filed.

4 “The three requirements for an acceptable certification under § 109(h)(3)(A)
5 are couched in conjunctive language and, therefore, all three must be satisfied for the
6 certification to be effective as a temporary exemption from the pre-petition briefing
7 mandated by § 109(h)(1).” *Cleaver*, 2005 WL 3099686, at *4; *see also In re Watson*,
8 332 B.R. 740, 745 (Bankr. E.D. Va. 2005) (finding that, under the rules of statutory
9 construction, § 109(h)(3)(A) should be read in the conjunctive).

10 In the end, the statute is simple. The performance of credit
11 counseling pre-petition is a first-level requirement for any
12 individual who seeks bankruptcy relief. That prerequisite may be
13 overridden, and the court may permit the credit counseling to be
14 obtained post-petition. However, this is possible only if a debtor
15 certifies that she meets the requirements of 11 U.S.C.

16 § 109(h)(3)(A), in their exacting detail. If such a debtor does not
17 submit this certification with her petition for bankruptcy, in
18 proper form, and with content evidencing the statute’s
19 substantive requirements in a way “satisfactory to the court,” the
20 first-level requirement is not overridden. When that is the case, a
21 debtor must show, as part of her initial filing, that she has
22 received credit counseling pre-petition. That is done by “filing
23 with the court” the credit counseling agency’s certificate that it
24 provided described services to the debtor, with her petition for
25 bankruptcy.

1 *In re Wallert*, 2005 WL 3099679, at *5 (Bankr. D. Minn. Nov. 17, 2005).

2 Absent exigent circumstances, § 109(h) requires that the consumer credit
3 counseling requirement must be fulfilled prior to filing for bankruptcy protection in all
4 cases filed on and after October 17, 2005. *See also Wallert*, 2005 WL 3099679, at *5
5 (“The application of § 109(h), as thus read, falls heavily on one subset of debtors-
6 particularly at present, in the early stages of a transition to a new bankruptcy law
7 regime. Nonetheless, because the requirements of the statute are so clear and so
8 exacting on their face, and because they dovetail with a rational divination of
9 congressional intent, it simply is not open to the courts to depart from their express
10 terms.”); *Cleaver*, 2005 WL 3099686, at *2 (“The statute is unequivocal and allows for
11 no other excuse or exception.”). Additionally, in order to comply with any of the
12 § 109(h) requirements, counseling must at least be attempted prior to filing the
13 bankruptcy petition, even if it cannot be completed. *See In re Talib*, 2005 WL 3272411,
14 at *5 (Bankr. W.D. Mo. Dec. 1, 2005) (“Because the Debtor did not obtain the credit
15 counseling prior to the filing of the petition, and because she does not qualify for an
16 exigent circumstances waiver, she is not eligible to be a debtor under § 109(h). Under
17 these circumstances, the Court may not grant the requested extension to obtain the
18 credit counseling postpetition.”).

19 Here, the Debtors did not, as required by 11 U.S.C. § 521(b), file a
20 certificate from an approved nonprofit budget and credit counseling agency that
21 provided the services required by § 109(h)(1). They did, however, file a Certification of
22 Exigent Circumstances along with their petition. Nevertheless, the Certification does
23 not comply with the requirements set forth in § 109(h)(3)(A), because it does not state
24 that the Debtors attempted to obtain credit counseling services pre-petition but the
25 agency could not provide them with counseling within five days. Furthermore, the

1 Debtors' certification that they "do not believe they can come up with the \$50.00
2 required by Consumer Credit Counseling until Friday, October 21, 2005, and need to
3 file their Chapter 13 case immediately," does not, in my opinion, begin to meet the
4 "exigent circumstances" test contemplated by Congress in the enactment of § 109(h)(3).
5 In the court's mind, it is disingenuous for an individual who is on the verge of
6 bankruptcy to rely upon a lack of funds to support a claim of "exigent circumstances."
7 While the term is undefined by the Bankruptcy Code, the court believes that the
8 "exigent circumstances" contemplated by § 109(h)(3) are somewhat akin to the
9 "incapacity, disability, or active military duty" test of § 109(h)(4) that will allow a court
10 to excuse entirely the § 109(h)(1) credit counseling requirements. By these terms,
11 Congress has expressed its intention that something considerably more than mere
12 inconvenience to the debtor is required if the credit counseling briefing is to be waived,
13 even temporarily. The court recognizes, however, that the "exigent circumstances" test
14 is fact specific and is not by these comments intending to place a definition on that term
15 or to otherwise suggest how it might rule in future cases. Case law will ultimately
16 answer the question of what is meant by "exigent circumstances" and I suspect the
17 interpretation will vary greatly among the bankruptcy courts.

18 Furthermore, even if the Debtors' exigent circumstances were satisfactory in
19 this case and in compliance with the statute, they failed to complete credit counseling
20 within thirty days of filing their petition or obtain court approval for another fifteen-day
21 extension, as required by § 109(h)(3)(B). They did not obtain counseling until
22 December 3, 2005, which was forty-four days after they filed their case and one day
23 after the Chapter 13 Trustee filed her Motion to Dismiss.

24 The court has absolutely no discretion under the statute. This case must be
25 dismissed and I will enter an appropriate order to that effect this afternoon.

1 This Memorandum constitutes findings of fact and conclusions of law as
2 required by FED. R. CIV. P. 52(a), made applicable to this contested matter by
3 Rule 9014(c) of the Federal Rules of Bankruptcy Procedure. I will ask the court
4 reporter to transcribe my opinion, with the original being delivered to me for such
5 additions and corrections as I deem appropriate. This opinion will be placed on the
6 court's web site and will be sent in for publication. While there will certainly be no
7 substantive changes, the Memorandum will be set in a publishable format.

8 FILED: December 8, 2005

9 /s/ Richard Stair, Jr.
10 RICHARD STAIR, JR.
U.S. BANKRUPTCY JUDGE